Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER 1993 TERM

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COLORADO DEPARTMENT OF HEALTH AND
MILDRED SIMMONS,

*Petitioners,*

*v.*

BERNADETTE BAUMAN, MARION SMITH, AND
ANTOINETTE J. STAJDUHAR,

*Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

---

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## QUESTION PRESENTED

1. Whether the Colorado Court of Appeals violated the Supremacy Clause and essential principles of federalism in holding that the Colorado Governmental Immunity Act's jurisdictional limitation on Colorado state courts cannot bar suits in Colorado state courts under federal law?

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## OPINION BELOW

The decision of the Colorado Court of Appeals has been published at 857 P.2d 499 (Colo. App. 1993).

## JURISDICTION

The Colorado Court of Appeals entered judgment on January 28, 1993. The Court denied petitioner's petition for rehearing on March 11, 1993.

The Colorado Supreme Court granted petitioner an extension of time to file a petition for certiorari to and including April 19, 1993. Petitioner filed its petition for certiorari with the Colorado Supreme Court on April 16, 1993. The Colorado Supreme Court denied petitioner's petition for certiorari on September 7, 1993. The order denying certiorari stated that Justice Kirshbaum would have granted certiorari with respect to the issue presented by petitioner to this Court.

This Court granted petitioner an extension of time within which to file its petition for certiorari to and including January 5, 1994.

This Court has jurisdiction to entertain this petition for certiorari pursuant to the provisions of 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., art. VI, cl. 2:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U.S.C. § 1983:

> **Civil Action for Deprivation of Rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 24-10-109, C.R.S. (1988 Repl. Vol. 10B):

> (1) Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment shall file a written notice as provided in this section within one hundred eighty days after the date of discovery of the injury, regardless of whether the person then knew all of the elements of a claim or of a cause of action for such injury. Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought under the provisions of this article, and failure of compliance shall forever bar any such action.

Section 24-10-119, C.R.S. (1988 Repl. Vol. 10B):

> The provisions of this article shall apply to any action against a public entity or a public employee in any court of this state having jurisdiction over any claim brought pursuant to any federal law, if such action lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant.

## STATEMENT OF THE CASE

On September 28, 1989, plaintiffs brought an action arising out of their former employment with the Colorado Department of Health ("DOH"). (Vol. I, pp.1-3) Plaintiffs alleged that DOH is an agency of the State of Colorado. (Vol. I, p.1) In fact, DOH is a department of the State of Colorado. Sections 24-1-110(1)(i) and 24-10-119, C.R.S. Defendant Mildred Simmons ("Simmons") was, at all times relevant to plaintiffs' allegations, the Director of the Division of Health Facilities at DOH. (Vol. I, p.1) Plaintiffs brought their claims under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-623, the Fair Labor Standards Act, 29 U.S.C. §§ 216(b)-217 and §§ 24-34-301 to 306, C.R.S. (1988).

On February 14, 1990, defendants filed their motion to dismiss and attached thereto the affidavit of Micki V. Perez, a records custodian with the Office of the Attorney General of the State of Colorado for notices of claim under the Colorado Governmental Immunity Act. This affidavit recited that she had examined the files of the Attorney General and found no notice of claim received from any of the plaintiffs. (Vol. I, p.20)

On July 31, 1991, the district court entered its order finding that plaintiffs had not complied with the provisions of § 24-10-109, C.R.S., applicable through operation of § 24-10-119, C.R.S., and also finding that plaintiffs' filing of the charges of discrimination did not constitute a notice of claim as contemplated by § 24-10-109, C.R.S. (1988). (Vol. I, pp.45-46) Upon a further finding that plaintiffs had failed to provide a notice of claim as required by § 24-10-109, C.R.S., and that their claims were thus jurisdictionally barred, the trial court dismissed plaintiffs' cause of action. (Vol. I, p.46)

The Colorado Court of Appeals affirmed in part and reversed in part. The Court held that, since plaintiffs had not complied with the jurisdictional requirements of § 24-10-109, C.R.S., their state claims for relief were barred. However, the

Court held that plaintiffs' failure to comply with § 24-10-109, C.R.S. did not bar their federal claims.

Petitioner filed a petition for certiorari with the Colorado Supreme Court, contending that the Court of Appeals interpreted *dicta* in this Court's decision of *Howlett v. Rose,* 496 U.S. 356, 110 S. Ct. 2430, 110 L.Ed.2d 332 (1990), in such a manner as to violate principles of federalism by precluding the Colorado General Assembly from establishing the jurisdiction of its state courts.

Respondents filed a cross-petition for certiorari, contending that the Court of Appeals erred in concluding that the notice provided in the age discrimination charges did not substantially comply with the notice provisions of the Colorado Governmental Immunity Act.

The Colorado Supreme Court denied certiorari with respect to both petitioner's petition for certiorari and respondents' cross-petition for certiorari. The order denying certiorari indicated that Justice Kirshbaum would have granted certiorari with respect to both issues.

This petition for certiorari follows.

## STATEMENT OF RELATED CASES

There are no related cases.

## REASONS FOR GRANTING THE WRIT

### A. The Colorado Court of Appeals Interpreted *Dicta* in This Court's Decision of *Howlett v. Rose,* 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990), in Such a Manner as to Violate Principles of Federalism by Precluding the Colorado General Assembly From Establishing the Jurisdiction of the Colorado State Courts

The present language of § 24-10-109, C.R.S., as passed by the Colorado General Assembly in 1986, provides the following regarding filing of a notice of claim:

> (1) Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment shall file a written notice as provided in this section within one hundred eighty days after the date of discovery of the injury, regardless of whether the person then knew all of the elements of a claim or of a cause of action for such injury. *Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought under the provisions of this article,* and failure of compliance shall forever bar any such action. (Emphasis added)
>
> (2) The notice shall contain the following:
>
> (a) The name and address of the claimant and the name and address of his attorney, if any;
>
> (b) A concise statement of the factual basis of the claim, including the date, time, place, and circumstances of the act, omission, or event complained of;
>
> (c) The name and address of any public employee involved, if known;
>
> (d) A concise statement of the nature and the extent of the injury claimed to have been suffered;
>
> (e) A statement of the amount of monetary damages that is being requested.

> (3) If the claim is against the state or an employee thereof, the notice shall be filed with the attorney general. If the claim is against any other public entity or an employee thereof, the notice shall be filed with the governing body of the public entity or the attorney representing the public entity. Such notice shall be effective upon the mailing by registered mail or upon personal service.

Section 24-10-119, C.R.S. provides:

> The provisions of this article shall apply to any action against a public entity or a public employee in any court of this state having jurisdiction over any claim brought pursuant to any federal law, if such action lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant.

In 1986, compliance with § 24-10-109, C.R.S. was made a *jurisdictional* prerequisite to any action brought under the Colorado Governmental Immunity Act ("Act"). *See Aetna Cas. & Surety Co. v. Denver School Dist. No. 1,* 787 P.2d 206 (Colo. App. 1989). Failure to strictly comply with the 180-day notice provision operates as a jurisdictional bar to any claim arising under the Act. *East Lakewood Sanitation District v. District Court,* 842 P.2d 233 (Colo. 1992). Before the 1986 changes to § 24-10-109, C.R.S., and the enactment of § 24-10-119, C.R.S., the Colorado Court of Appeals held that the notice of claim requirement did not apply to federal claims under 42 U.S.C. § 1983. *Mucci v. Falcon School Dist. No. 49,* 655 P.2d 422 (Colo. App. 1982); *also see Chacon v. Zahorka,* 663 F. Supp. 90 (D. Colo. 1987).

The issue presented in this case is whether the 1986 changes to the Act, making compliance with § 24-10-109 jurisdictional as to both state and federal claims, were improperly invalidated by the Colorado Court of Appeals. More specifically, the question presented in this case is whether the Court of Appeals' erred in its implicit determination that § 24-10-119 is unconstitutional in

violation of the Supremacy Clause of the United States Constitution. DOH submits that no United States Supreme Court decision limits the ability of the states to restrict state court jurisdiction under Supremacy Clause rubric, yet that is the necessary implication of the Court of Appeals interpretation of *Felder v. Casey,* 487 U.S. 131, 108 S.Ct. 2303, 101 L.Ed.2d 123 (1988) and *Howlett v. Rose,* 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990).

In *Felder v. Casey, supra,* this Court held that a Wisconsin notice of claim statute, which was *not* a restraint on the jurisdictional authority of Wisconsin's state courts, did not apply to a 42 U.S.C. § 1983 claim brought in state court. In reversing the Wisconsin Supreme Court's decision, this Court held that, although states may establish rules of procedure governing litigation in their own courts, when state courts entertain a federally created cause of action, the federal claim cannot be defeated by forms of local practice.

*Felder v. Casey* is consistent with the Colorado Court of Appeals' decision in *Mucci v. Falcon School Dist. No. 49, supra.* However, neither *Felder v. Casey* nor *Mucci* addressed a situation in which, by statute, the failure of a claimant to comply with a notice of claim statute divests state district courts of subject matter jurisdiction over *all* tort claims, both state and federal, against governmental entities, and does so in a purely neutral manner. That issue is presented here and the issue was incorrectly decided by the Colorado Court of Appeals. The flaw in the Court of Appeals' reasoning results from its interpretation of what petitioner perceives as *dicta* in this Court's decision in *Howlett v. Rose, supra.*

In *Howlett v. Rose, supra,* this Court held that a state law sovereign immunity defense is not available in a § 1983 action brought in a state court that otherwise has jurisdiction when that defense would not be available if the action were brought in a federal forum. The Court premised its holding on the fact that the state law sovereign immunity defense did not operate in a neutral manner and discriminated against the § 1983 federal

cause of action. 110 S.Ct. at 2440. *See FERC v. Mississippi,* 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982).

However, this Court in *Howlett* also emphasized certain principles of federalism which, DOH contends, are nullified by the Colorado Court of Appeals decision in this case. This Court in *Howlett* noted that when a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, the Supreme Court "must act with utmost caution before deciding that it is obligated to entertain the claim." 110 S.Ct. at 2440. Further, the Supreme Court articulated that:

> The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.' [Cites] The States thus have great latitude to establish the structure and jurisdiction of their own courts. [Cite] In addition, States may apply their own neutral procedural rules to federal claims, unless those rules are preempted by federal law.

110 S.Ct. at 2441. *Also see Martinez v. California,* 444 U.S. 277, 283, n.7, 100 S.Ct. 553, 558, n.7, 62 L.Ed.2d 481 (1980) (the states need not establish courts competent to entertain § 1983 claims).

In *Howlett,* this Court never confronted the issue presented in this case: whether a Governmental Immunity Act notice requirement which is jurisdictional and *neutral* is invalid with respect to any federal claim. Stated another way, is a state court of general jurisdiction compelled to entertain a federal claim when state claims arising out of the same incident are jurisdictionally barred by the application of a neutral state law? The notice requirement of § 24-10-109, C.R.S. (1988 Repl. Vol. 10A) was made jurisdictional in 1986 and applies in the same manner

to both state and federal causes of action. *See* § 24-10-119, C.R.S. Thus, the consequences of the Court of Appeals' decision here is to violate the principle of federalism prohibiting federal law from requiring the state to create a court competent to hear a case in which the federal claim is presented. *See Martinez v. California, supra; also see Herb v. Pitcairn,* 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed.2d 789 (1945). In effect, the decision of the Colorado Court of Appeals dictates that federal claimants need not "take the state courts as [he] finds them," *Howlett,* 110 S.Ct. at 2441, although all other claimants must.

The Court of Appeals' holding is premised upon the following *dicta* contained in *Howlett*:

> The force of the Supremacy Clause is not so weak that it can be evaded by mere mention of the word 'jurisdiction.' Indeed, if this argument had merit, the State of Wisconsin could overrule our decision in *Felder v. Casey,* 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988), by simply amending its notice of claim statute to provide that no state court would have jurisdiction of an action in which the plaintiff failed to give the required notice.

110 S.Ct. at 2446. This language cannot be read to mean that a notice of claim statute which is jurisdictional and neutral on its face can *never* bar a federal claim. If this were so, the principles of federalism articulated in *Howlett* previous to this language would be rendered meaningless. Some state procedural requirements are jurisdictional in nature. For example, the failure to *timely* file a notice of appeal pursuant to C.A.R. 4 deprives the Colorado appellate courts of jurisdiction and requires dismissal of the appeal. *Federal Lumber Co. v. Hanley,* 33 Colo. App. 18, 515 P.2d 480 (1973). By the only logical extension of the Court of Appeals' reasoning in this case, failure to timely file a notice of appeal under C.A.R. 4 cannot impede a federal claim. Otherwise the proscription in *Howlett* against state restrictions dressed in the language of jurisdictional limitations would be contravened.

However, this cannot have been the intent of this Court in *Howlett.*

The notice requirement of § 24-10-109 was not an attempt to evade the Supremacy Clause "by mere mention of the word jurisdiction." The Colorado General Assembly did not attempt to overrule *Felder v. Casey* by amending its notice of claim statute to make it jurisdictional; *Felder v. Casey* was decided in 1988, but the Colorado Governmental Immunity Act was amended in 1986. The decision to make § 24-10-109 jurisdictional was the result of a deliberative legislative process based upon important public policy considerations, not a reactive evasion of this Court's holding in *Felder v. Casey.* Where a state statute which is jurisdictional applies neutrally to both state and federal claims, the state court lacks jurisdiction over the claim and federalism precludes federal law from compelling the state court to exercise jurisdiction. *See Reiff v. Avon School Dist. No. 4-1,* 458 N.W.2d 358 (S.D. 1990); *also see Howlett, supra.*

The effect of the Court of Appeals' decision in this case is to nullify § 24-10-119, C.R.S., as well as C.A.R. 4 and all other existing procedural restraints in Colorado law, with respect to the pursuit of federal claims in Colorado's state courts, and to impose jurisdiction on state courts over federal claims arising from the same operative facts as state claims which are jurisdictionally barred. *See Aetna Cas. & Surety Co. v. Denver School Dist. No. 1, supra.* Since this holding violates the principles of federalism articulated in *Howlett,* DOH submits this decision must be reversed.

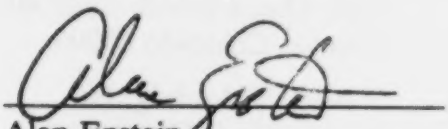
## CONCLUSION

This case presents an issue of first impression, one unanswered by this Court in *Howlett,* i.e., whether a neutral statutory scheme depriving state courts of jurisdiction over both state and federal claims where the claimant did not comply with notice of claim requirements violates the Supremacy Clause of the United States Constitution. As previously discussed, the effect of the

Court of Appeals' decision is also to invalidate § 24-10-119, C.R.S. Because of the impact of the Court of Appeals decision on the exercise by states of sovereignty over their courts, it presents exactly that type of issue for which the certiorari process exists. *See* Supreme Court Rule 10.1(c).

Dated this 3rd day of January, 1994.

Respectfully submitted,



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**CERTIFICATE OF MAILING**

I hereby certify that on this 3rd day of January, 1994 a true and correct copy of the foregoing **PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT** was mailed by placing the same in the United States Mail, postage prepaid, addressed as follows:

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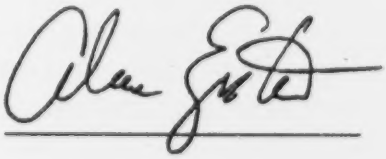

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*Petitioners,*

*v.*

BERNADETTE BAUMAN, MARION SMITH, AND
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*Respondents.*

---

## PETITIONER'S APPENDIX

---

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COLORADO
COURT OF APPEALS
No. 91CA1528
January 28, 1993

BERNADETTE BAUMAN, MARION SMITH, AND ANTOINETTE STAJDUHAR,

*Plaintiffs-Appellants,*

v.

COLORADO DEPARTMENT OF HEALTH, AND MILDRED SIMMONS,

*Defendants-Appellees.*

---

Appeal from the District Court of the City and County of Denver
**Honorable R. Michael Mullins,** *Judge*
**No. 89CV13625**

Division V
Opinion by JUDGE JONES
Hume and Marquez, JJ., concur

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED WITH DIRECTIONS

---

Vonda G. Hall, Denver, Colorado, for Plaintiffs-Appellants

Hall & Evans, David R. Brougham, Denver, Colorado, for Defendant-Appellee Colorado Department of Health

Wood, Ris & Hames, P.C., F. Michael Ludwig, Denver, Colorado, for Defendant-Appellee Mildred Simmons

Plaintiffs, Bernadette Bauman, Marion Smith, and Antoinette Stajduhar, appeal from the judgment dismissing their complaint against defendants, the Colorado Department of Health and Mildred Simmons, the Director of the Department's Division of Health Facilities, because plaintiffs failed to comply with

the notice provisions of the Colorado Governmental Immunity Act. We affirm in part and reverse in part.

The complaint alleged that plaintiffs had been employed by the Department and that Simmons had been their supervisor. It further alleged that plaintiffs were forced into early retirement as result of unlawful age discrimination in violation of state and federal anti-discrimination laws.

Specifically, Bauman asserted that she was forced to retire and was denied advancement prior to her retirement because of her age. She was 66 years old at retirement. Smith, who was 63 years old at retirement, claimed that she was forced to retire because of her age. Stajduhar, age 65 years at retirement, alleged that she was forced to retire and that, prior to retirement, was given a reassignment of duties which amounted to a demotion, all because of her age.

Pursuant to C.R.C.P. 12(b) (1) and (5), defendants filed a motion to dismiss the complaint, urging that all of plaintiffs' claims were jurisdictionally barred because they had failed to provide a notice of claim in compliance with § 24-10-109, C.R.S. (1988 Repl. Vol. 10A). The motion also requested the trial court to consider an affidavit and to treat the motion as one for summary judgment.

Plaintiffs filed a response, supported by an affidavit, in which they asserted that they had substantially complied with the notice provisions by providing defendants with copies of the charges filed with the Colorado Civil Rights Division and the Equal Employment Opportunity Commission. Relying on the United States Supreme Court's decision in *Felder v. Casey,* 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988), they further asserted that failure to comply with a state notice requirement does not act as a bar to federal claims.

Defendants filed a reply, urging that the *Felder* ruling not apply because of the language of § 24-10-119, C.R.S. (1988 Repl. Vol. 10A) which extended the notice requirement to federal claims. The trial court agreed. The court also determined that

the copies of charges which plaintiffs provided to defendants did not comply with the notice requirements of § 24-10-109. Therefore, the trial court dismissed the complaint.

I.

With respect to their claims under state law, plaintiffs' sole contention is that the copies of charges provided to the Department substantially complied with the notice provisions of the Governmental Immunity Act. We disagree.

Section 24-10-109(1), C.R.S. (1988 Repl. Vol. 10A) requires any person claiming to have suffered an injury by a public entity or by an employee thereof to file notice of the claim within 180 days after the discovery of the injury. Further, § 24-10-109(3), C.R.S. (1988 Repl. Vol. 10A) provides that the notice *shall* be filed with the attorney general if the claim is against the state or an employee thereof.

Compliance with these mandatory provisions was made a jurisdictional prerequisite to any action brought under the provisions of the Act. *See Aetna Casualty & Surety Co. v. Denver School District No. 1,* 787 P.2d 206 (Colo. App. 1989).

Plaintiffs point to the language in *Woodsmall v. Regional Transportation District,* 800 P.2d 63 (Colo. 1990), in which our supreme court interpreted the term "compliance" to mean "substantial compliance," which it defined as a degree of compliance that was "considerably more than minimal, but less than absolute." However, the alleged lack of compliance in *Woodsmall* dealt with the contents of a timely notice, a copy of which had been sent to the entity's counsel as required by § 24-10-109(3). *See East Lakewood Sanitation District v. District Court,* ____ P.2d ____ (Colo. No. 92SA242, December 14, 1992).

Here, the record does not reveal when the documents purporting to constitute notice were mailed to the Department. Therefore, we are unable to determine whether the purported notice was timely. However, it was undisputed that the copies of

documents upon which plaintiffs rely as notices of claim were mailed to the Department of Health, and not to the Attorney General as required by § 24-10-109(3). Thus, plaintiffs failed to meet their burden of demonstrating that the trial court had jurisdiction over the subject matter of their state-law claims. *See East Lakewood Sanitation District v. District Court, supra; Aetna Casualty & Surety Co. v. Denver School District No. 1, supra.*

Accordingly, we conclude that the trial court was correct in its determination that plaintiffs' mailing of documents to the Department did not amount to substantial compliance with § 24-10-109.

II.

Plaintiffs also contend that the trial court erred in concluding that the notice provisions of § 24-10-109, C.R.S. (1988 Repl. Vol. 10A) operated as a bar to their federal claims. In support of this contention, plaintiffs again assert that the rule announced in *Felder v. Casey, supra,* pre-empted the General Assembly from adopting notice requirements which are inconsistent with federal law. They further rely upon the holdings in *Chacon v. Zahorka,* 663 F. Supp. 90 (D. Colo. 1987) (notice of claim is not required in federal civil rights case); and *Mucci v. Falcon School District No. 49,* 655 P.2d 422 (Colo. App. 1982) (federal civil rights claims are not barred by plaintiffs' failure to comply with notice provisions of Governmental Immunity Act).

In support of the judgment, however, defendants argue that *Chacon v. Zahorka, supra,* and *Mucci v. Falcon School District #49, supra,* have no current precedential value because those cases were decided under the pre-1986 version of § 24-10-109. Defendants also argue that the 1986 amendments to the Governmental Immunity Act made compliance with the notice requirement a jurisdictional prerequisite to any tort action against a public entity, including any claim brought pursuant to any federal law. *See* §§ 24-10-109 and 24-10-119, C.R.S. (1988 Repl. Vol. 10A).

Finally, citing *Boulder Valley School District R-2 v. Price,* 805 P.2d 1085 (Colo. 1991), defendants argue that, because the notice requirement applies equally to federal and state claims, § 24-10-109 is a valid jurisdictional limitation on the ability of Colorado courts to hear plaintiffs' federal claims. We are not persuaded.

In *Felder v. Casey, supra,* the United States Supreme Court reviewed a decision by the supreme court of Wisconsin which had held that a state notice of claim statute was applicable to federal civil rights actions brought in state court under 42 U.S.C. § 1983. In reversing the Wisconsin decision, the court held that, although states may establish rules of procedure governing litigation in their own courts, when state courts entertain a federally created cause of action, the federal claim cannot be defeated by forms of local practice. The court concluded that, because the state notice of claim statute conflicted with the remedial objectives of § 1983, the state law was pre-empted when the § 1983 action was brought in a state court.

The *Felder* ruling was cited with approval by the U.S. Supreme Court in *Howlett v. Rose,* 496 U.S. ___, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). In that case, the Court held that a state law defense of sovereign immunity could not be asserted against a claim arising under 42 U.S.C. § 1983 which had been brought in state court. In rejecting contentions that the defense should apply, the Court stated:

> The fact that a rule is denominated jurisdictional does not provide a [state] court an excuse to avoid the obligation to enforce federal law. . . .
>
> The force of the Supremacy Clause is not so weak that it can be evaded by mere mention of the word 'jurisdiction.' Indeed, if this argument had merit, [a state] could overrule our decision in *Felder v. Casey* . . . by simply amending its notice of claims statute to provide that no state court would have jurisdiction of an action in

which the plaintiff failed to give the required notice. The Supremacy Clause requires more than that.

Even if we were to agree that *Chacon v. Zahorka, supra,* and *Mucci v. Falcon School District #49, supra,* no longer have precedential value because of the 1986 amendments to the Governmental Immunity Act, we consider the rulings in *Felder* and *Howlett* to be dispositive of the parties' arguments. In summary, to apply the state jurisdictional notice requirement to plaintiffs' federal claims would run counter to the Supremacy Clause as construed in *Felder* and *Howlett.*

Finally, contrary to defendants' contention, we do not consider the analysis in *Boulder Valley School District v. Price, supra,* to furnish any support for their contention here. In that case, our supreme court held that state courts may determine the burden of proof applicable to an award of punitive damages under 42 U.S.C. § 1983. The issue here, however, is the validity of a statutory notice requirement, and we read *Felder* and *Howlett* as precluding application of that requirement to claims based upon federal law. Thus, we conclude that the trial court erred in holding that the notice requirements of § 24-10-109 operated as a bar to plaintiffs' federal claims.

That part of the judgment dismissing plaintiffs' state law claims is affirmed. That part of the judgment dismissing plaintiffs' federal claims is reversed, and the cause is remanded to the trial court for entry of an order reinstating plaintiffs' federal claims and for further proceedings consistent with the views expressed in this opinion.

JUDGE HUME and JUDGE MARQUEZ concur.

**THE COURT OF APPEALS OF THE STATE OF COLORADO**

**Case Number 91CA1528**

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**ORDER**

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BERNADETTE BAUMAN ET AL v COLORADO DEPT. OF HEALTH ET AL

Upon consideration of the Petitions for Rehearing filed by the Appelle and Appellant herein, the Petitions are hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including April 12, 1993 provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:

Jones, J.

Hume, J.

Marquez, J.

DATED: March 11, 1993

SUPREME COURT, STATE OF COLORADO
CASE NO. 93SC229
CERTIORARI TO THE COLORADO
COURT OF APPEALS, 91CA1528
DISTRICT COURT, CITY AND COUNTY OF DENVER, 89CV13625

## ORDER OF COURT

Colorado Department of Health and
Mildred Simmons,

*Petitioners/Cross-Respondents,*

*v.*

BERNADETTE BAUMAN, MARION SMITH, AND
ANTOINETTE J. STAJDUHAR,

*Respondents/Cross Petitioners.*

Upon consideration of the Petition and the Cross-Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition and Cross-Petition for Writ of Certiorari shall be, and same hereby are, DENIED.

BY THE COURT, EN BANC, SEPTEMBER 7, 1993.

JUSTICE KIRSHBAUM would grant as to the following issues:

Whether the court of appeals, in holding that the Colorado Governmental Immunity Act's 180-day notice provision cannot be a bar to suits brought under federal law, misapplied Supreme Court precedent in such a way as to violate the Supremacy Clause and principles of federalism.

Whether the court of appeals erred when it concluded that the notice provided in the age discrimination charges did not substantially comply with the notice provisions of the Governmental Immunity Act.

cc:

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James Benway, Clerk
Colorado Court of Appeals

**CERTIFICATE OF MAILING**

I hereby certify that on this 3rd day of January, 1994 a true and correct copy of the foregoing **PETITIONER'S APPENDIX** was mailed by placing the same in the United States Mail, postage prepaid, addressed as follows:

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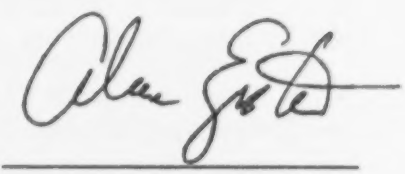

Supreme Court, U.S.
FILED
MAR - 4 1994
OFFICE OF THE CLERK

No. 93-1105

In The

# Supreme Court of the United States

October Term 1993

COLORADO DEPARTMENT OF HEALTH
AND MILDRED SIMMONS

*Petitioners,*

v.

BERNADETTE BAUMAN, MARION SMITH,
AND ANTOINETTE STAJDUHAR,

*Respondents.*

**On Petition For A Writ Of Certiorari
To The Colorado Supreme Court**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Colorado Court of Appeals erred when it held the state's notice of claim statute does not bar the federal claims brought in the state court.

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## STATEMENT OF THE CASE

Petitioner Colorado Department of Health seeks review of the Colorado Court of Appeal's decision in *Bauman, et al. v. Colo. Dep't of Health*, 857 P.2d 499 (Colo. App. 1993), *cert. denied* Sept. 7, 1993, *petition for cert. filed*, 62 U.S.L.W. 3493 (Jan. 3, 1994) (No. 93-1105), which reversed the trial court's dismissal of the respondents' federal age discrimination claims. It is respondents' position that the court of appeals did not err when it held that the state's notice of claim statute did not apply to the federal claims in reversing the trial court. For the purposes of this brief, the Statement of the Case as found in the Petition for Writ of Certiorari, except for the statements that the trial court and the court of appeals found that the respondents' claims were jurisdictionally barred (which are not reflected in the record), are accepted as true.

## REASONS FOR DENYING THE WRIT

**The Colorado Court of Appeal's holding that the state notice of claim statute does not bar federal age discrimination claims brought in state court is consistent with the Supremacy Clause of the U.S. Constitution and existing case law.**

In petitioning this Court for certiorari, Petitioner Colorado Department of Health ("Department") argues that the holding of the Colorado Court of Appeals violated the principles of federalism when it held that the state notice provision contained in § 24-10-109 C.R.S. (1988 Repl. Vol. 10A), did not bar the federal age discrimination claims brought by the plaintiffs in the state district

court. *Bauman, et al. v. Colo. Dep't of Health, supra.* In doing so, the Department misapprehends the principles underlying the Supremacy Clause, the nature of concurrent jurisdiction, and the applicable state law.

Controversies involving the power and the duty of state courts to enforce federal laws were resolved in the 1860's. *Testa v. Katt,* 330 U.S. 386 (1947). The fundamental issues raised and resolved by the war were addressed by the Supreme Court in that period and the principle that the federal law is the supreme law of the land which states are obligated to enforce has been ingrained since that time. *Id.* at 389.

The petitioner does not challenge that the state court has concurrent jurisdiction over the age discrimination claims. Rather, the argument being made by the petitioner appears to be that this jurisdiction is somehow contingent upon the state claims. However, the jurisdiction of the federal claims arise independently of the state claims. As stated in *Howlett v. Rose,* 496 U.S. 356 (1990):

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might well be true – *but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature.* The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

496 U.S. at 367 (emphasis added).

Further, " '[t]he existence of the jurisdiction creates an implication of duty to exercise it.' " *Id.* at 369-370 (quoting *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1 (1912)). *See also Testa v. Katt, supra* (to deny jurisdiction of a federal claim, even if the claim is in conflict with state policy, violates the Supremacy Clause).

*Felder v. Casey*, 487 U.S. 131 (1988) (hereinafter "*Felder*"), addressed the conflict of state notice of claim statutes with federal substantive law and held that the state statute must yield to the federal law. "Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' " 487 U.S. at 138 (quoting *Free v. Bland*, 369 U.S. 663 (1962)).

The issue decided by the state court of appeals was phrased in *Felder* as follows:

> The question before us today, therefore, is essentially one of pre-emption: is the application of the State's notice-of-claim provision to [federal age discrimination] actions brought in state courts consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead " 'stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' "?

*Id.* at 138.

In reaching its holding that the notice of claim statute could not be applied to a federal claim, the Court in *Felder* stressed the fact that if such a provision should be

applied, the result would be outcome-dependent upon whether a case was filed in state or federal court. The *Felder* Court explained its rationale as follows:

> These [lower federal] courts have reasoned that, unlike the lack of statutes of limitations in the federal civil rights laws, the absence of any notice-of-claim provision is not a deficiency requiring the importation of such statutes into the federal civil rights scheme. Because statutes of limitation are among the universally familiar aspects of litigation considered indispensable to any scheme of justice, it is entirely reasonable to assume that Congress did not intend to create a right enforceable in perpetuity. Notice-of-claim provisions, by contrast, are neither universally familiar nor in any sense indispensable prerequisites to litigation, and there is thus no reason to suppose that Congress intended federal courts to apply such rules, which "significantly inhibit the ability to bring federal actions." 239 U.S. App. D.C., at 354, 742 F.2d, at 1507.

> While we fully agree with this near-unanimous conclusion of the federal courts, that judgment is not dispositive here, where the question is not one of adoption but of pre-emption. Nevertheless, this determination that notice-of-claim statutes are inapplicable to federal-court § 1983 litigation informs our analysis in two crucial respects. First, it demonstrates that the application of the notice requirement burdens the exercise of the federal right by forcing civil rights victims who seek redress in state courts to comply with a requirement that is entirely absent from civil rights litigation in federal courts. This burden, as we explain below, is inconsistent in both design and effect with the compensatory

> aims of the federal civil rights laws. Second, it reveals that the enforcement of such statutes in § 1983 actions brought in state court will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court. *States may not apply such an outcome-determinative law when entertaining substantive federal rights in their courts.*

*Id.* at 140-141 (emphasis added).

Although *Felder* was addressing a § 1983 civil rights claim, its holding is applicable here where the claims were brought under the Federal Age Discrimination in Employment Act. *See Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990).

*Felder* also addressed and dismissed the argument raised in the Petition for Writ of Certiorari that the notice of claim provision constitutes a "neutral" state rule which the state may apply. It states:

> This burdening of a federal right, moreover, is not the natural or permissible consequence of an otherwise neutral, uniformly applicable state rule. Although it is true that the notice-of-claim statute does not discriminate between state and federal causes of action against local governments, the fact remains that the law's protection extends only to governmental defendants and thus conditions the right to bring suit against the very persons and entities Congress intended to subject to liability. . . . On the contrary, the notice-of-claim provision is imposed only upon a specific class of plaintiffs – those who sue governmental defendants – and, as we have seen, is firmly rooted in policies very much

> related to, and to a large extent directly contrary to, the substantive cause of action provided those plaintiffs. *This defendant-specific focus of the notice requirement serves to distinguish it, rather starkly, from rules uniformly applicable to all suits,* such as rules governing service of process or substitution of parties, which respondents cite as examples of procedural requirements that penalize noncompliance through dismissal.

*Id.* at 144-145 (emphasis added).

In its discussion relating to the principle being argued in the Petition for Writ of Certiorari that a state can refuse jurisdiction and is not required to "create" a court, the Supreme Court in *Howlett* reaffirmed its position in *Felder*:

> In *Felder v. Casey*, we . . . held that a Wisconsin notice-of-claim statute that effectively shortened the statute of limitations and imposed an exhaustion requirement on claims against public agencies and employees was pre-empted insofar as it was applied to § 1983 actions . . . . We concluded: "The decision to subject state subdivisions to liability for violations of federal rights . . . was a choice that Congress, not the Wisconsin Legislature, made, and it is a decision that the State has no authority to override."

496 U.S. at 377 (relying upon and quoting *Martinez v. California*, 444 U.S. 277 (1980)).

Further, the basic principle of federalism applied by the *Bauman* court is consistent with earlier Colorado appellate cases. *Williams v. Speedster, Inc.*, 175 Colo. 73, 485 P.2d 728 (1971); *Mucci v. Falcon School Dist. No. 49*, 655 P.2d 422 (Colo. App. 1982).

Finally, contrary to the Department's assertions, the statute itself does not provide that the notice provision is jurisdictional as to claims brought pursuant to federal law. The statute states that "[c]ompliance with the provisions of the section shall be a jurisdictional prerequisite to any article *brought under provisions of this article* . . . " § 24-10-109(1) (emphasis added). The provisions of that article apply to claims that had historically been barred by the doctrine of sovereign immunity. § 24-10-102, C.R.S. (1988 Repl. Vol. 10A). Federal causes of action do not fall within this category of claims.

## CONCLUSION

As discussed *supra*, the decision for which petitioner seeks review by this Court is founded upon well established principles enunciated in a long line of cases. Further, the Colorado state appellate courts have consistently held these basic tenets of law to be applicable and its decisions are not in conflict with this Court. *See* SUP. CT. R. 10.

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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March 4, 1994